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Supreme Court of the United States

OCTOBER TERM, 1932.

No. [redacted] 26

SOUTHERN RAILWAY COMPANY, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, at the Relation of H. G. SHIRLEY, Highway Commissioner, *Appellee*.

Appeal from the Supreme Court of Appeals of the State of Virginia.

BRIEF OF APPELLANT, UNDER RULE 7, PARAGRAPH 3, IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM, UNDER RULE 12, PARAGRAPH 3.

THOMAS B. GAY, Richmond, Va.,
SIDNEY S. ALDERMAN, Washington, D. C.,
Counsel for Appellant.

S. R. PRINCE, Washington, D. C.,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No. ——

SOUTHERN RAILWAY COMPANY, *Appellant*,

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COMMONWEALTH OF VIRGINIA, at the Relation of H. G. SHIRLEY, Highway Commissioner, *Appellee*.

Appeal from the Supreme Court of Appeals of the State of Virginia.

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

In connection with his statement asserting grounds making against the jurisdiction of this Court, filed under Rule 12, paragraph 3, the appellee has included a motion to dismiss or affirm. Such motion was served on appellant on March 28, 1933. Appellant, within twenty days after such service, files this brief, pursuant to Rule 7, paragraph 3, opposing the motion to dismiss or affirm.

The motion to dismiss or affirm is predicated solely upon the assertion that the federal constitutional question raised by the appeal is "so unsubstantial as not to need further argument." And the appellee's "Statement Opposing Jurisdiction" is confined to the same assertion, that there is no substantial merit in the federal constitutional question raised. There is no denial that appeal is the correct method of review here if the constitutional question is substantial. There is no denial that both the Corporation Commission and the Supreme Court of Appeals of Virginia treated the question of the constitutionality, under the due process clause of the 14th Amendment, of the state statute involved as having been properly raised for their decision and as being determinative of the case. There is no denial that both the commission and the court below passed upon that question and determined it in favor of the validity of the state statute. There is no denial that the question is properly preserved and brought here by the appeal papers. There is no denial of the technical jurisdiction of this Court by this appeal under the Judicial Code.

The only assertions against jurisdiction here, or for dismissal or affirmance, are that on the merits the decisions below were correct, that the statute of Virginia and the acts of the Highway Commissioner and the order of the Corporation Commission thereunder do not conflict with the 14th Amendment. Under the circumstances, this brief opposing the motion to dismiss or affirm, under Rule 7, paragraph 3, must necessarily address itself to the merits. There is nothing else to which it can be addressed.

In limine we suggest that the mere fact that the Corporation Commission needed a most elaborate opinion of 98 printed pages (R. 71-170)* to answer the constitutional attack of appellant, and the mere fact that the Supreme Court of Appeals of Virginia (R. 174-192) dealt with it

*Since the record here has not yet been reprinted, record references in this brief are to the pages of the record in the court below and to manuscript additions.

as a serious constitutional question under the 14th Amendment and that the Chief Justice and another justice of that court dissented from the holding of constitutionality, are *ipso facto* sufficient not only to show that color of substantiality which is pertinent at this stage (*Louisville & Nashville R. Co. v. Melton*, 218 U. S. 36, 49; *Milheim, et al. v. Moffatt Tunnel Improvement District*, 262 U. S. 710; 716-717), but also to show that a very serious question is raised under the 14th Amendment.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Appeals of Virginia, rendered the 12th day of January, 1933, has not yet been officially reported. It is contained in the record. (R. 174-192.) It may be found in 167 S. E. (adv.) 578-583.

II.

GROUNDS OF JURISDICTION OF THE COURT.

Paragraph 1 of Rule 12 has been complied with in appellant's Jurisdictional Statement, which sufficiently shows the grounds of the jurisdiction of this Court on appeal.

III.

THE FEDERAL CONSTITUTIONAL QUESTION RAISED.

We may restate the federal constitutional question raised. It is:

> Is it constitutional under the due process clause of the 14th Amendment, in the primary or procedural (adjective) sense of that clause, for a state, in a statute passed under its police power, to delegate to an individual administrative officer, a highway commissioner, the power, without notice or hearing to the rail-

road, without taking evidence, without following any semblance of legal procedure, to determine that public safety and convenience require the elimination of a particular existing railroad-highway grade crossing by the building of a highway overpass over the railroad to separate the grades, basing his determination solely upon his personal *ex parte* "opinion," and upon such determination alone, without notice or hearing or other proceeding, to require the railroad to furnish equipment and materials and part of its right of way and to construct, at its own expense in part, such overhead bridge for the highway, and to make that requirement final and impose a final legal duty on the railroad to obey it, without any provision for administrative, quasi-judicial, or judicial review of the merits of the question of whether public safety and convenience require the elimination, the railroad's only right of appeal being to appeal to the Corporation Commission for a revision of the plans for the structure, not to review the merits of the determination; and is such a determination and requirement, so made, competent under the 14th Amendment to impose a valid legal duty upon the railroad to obey.

The court below, by a divided court, answered the question in the affirmative. The mere statement of the question would seem to demand a negative answer. It would seem clear that the state cannot by statute delegate to an administrative officer the power to make an adjudication, determination and requirement, resulting in a taking of appellant's property, without notice, without hearing, without evidence, by mere administrative fiat, an authority which, as this Court declared in *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91, is "possessed by no other officer, administrative body, or tribunal under our government"; an authority which, as this Court there said, "however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary power."

IV.

SPECIFICATION OF ASSIGNED ERRORS URGED.

The federal constitutional question above stated is the one question raised by the one assignment of error and it is here urged. The assignment is (R. 195-196):

> "The Supreme Court of Appeals of Virginia erred in holding that Chapter 62, Acts of Virginia 1930, approved February 27, 1930, and the proceedings pursuant thereto whereunder the State Highway Commissioner of Virginia determined that in his opinion the elimination of an existing grade crossing of appellant's railroad and right of way and a state highway at Antlers, Virginia, was necessary for public safety and convenience and required appellant to provide all equipment and materials and construct, at its own expense in part, an overhead bridge to carry the state highway across and above appellant's right of way and track, are, as applied to appellant, valid and constitutional, and in affirming the decision by the State Corporation Commission of Virginia holding that said statute and said determination and requirement made by the State Highway Commissioner are valid and constitutional and impose an enforcible and constitutional legal obligation on appellant to obey said requirement and ordering appellant to obey and perform said requirement; the error being that the said statute is, and the said determination, requirement and enforcing order based thereon are, unconstitutional, null and void, taking appellant's property without due process of law, in violation of appellant's rights under the 14th Amendment to the Constitution of the United States, in that said statute by its terms undertakes to delegate to the State Highway Commissioner, an administrative official, the power to make, and that he did, pursuant solely to the supposed authority of said statute, make said determination and said requirement, without previous notice to appellant and without hearing afforded appellant as required by due process of law, without taking or considering evidence, based solely upon his personal *ex parte* opinion, and as the expression of a

purely arbitrary administrative fiat, and in that the said statute makes no provision for judicial review on the merits of his said determination as to public safety and convenience and makes the said determination final and irrevocable, and undertakes to create and impose upon appellant, upon the sole basis of said determination, an enforcible and final legal duty to perform the requirement of the State Highway Commissioner, thus depriving appellant of primary or procedural due process of law and taking its property without primary due process of law."

V.

THE STATE STATUTE, THE CONSTITUTIONALITY OF WHICH IS ATTACKED.

The statute of the State of Virginia, challenged as unconstitutional under the 14th Amendment, is Chapter 62 of the Acts of the General Assembly of the State of Virginia, Session 1930, approved February 27, 1930, official volume Acts of Assembly, Virginia, 1930, pages 73 to 75, both inclusive. A complete copy of the statute is contained in the record below, pages 57 to 59, inclusive. Virginia Code Ann. (Michie, 1930), sec. 3974a.

In its provision pertinent to the question here raised, the statute provides:

> " * * * Whenever the elimination of an existing crossing at grade of a State road by a railroad, or a railroad by a State road, and the substitution therefor of an overhead * * * crossing becomes, *in the opinion of the State Highway Commissioner*, necessary for public safety and convenience, * * * *the State Highway Commissioner shall notify in writing* the railroad company * * * upon which the existing crossing at grade * * * is, * * * *stating particularly the point at which * * * the existing grade crossing is to be eliminated * * * and that the public safety or convenience requires* that the crossing be made * * * above * * * the tracks of said railroad, or that the existing grade

crossing should be eliminated or abolished, and a crossing constructed above * * * the tracks of said railroad, * * *, and shall submit to said railroad company plans and specifications of the proposed work, the said crossing to be deemed to start at the points on each side of the tracks of the railroad where the grade under the plans and specifications herein provided for leaves the ground line of the State road to go over * * * the tracks of the railroad, and to include all work and structures between said points. *It shall thereupon be the duty of the railroad company to provide all equipment and materials and construct the overhead * * * crossing* * * * in accordance with the plans and specifications submitted by the State Highway Commissioner, within its right of way limits and the State Highway Commissioner such portion outside of said railroad right of way limits or such other division of the work as may be mutually agreed on." (Italics added.)

There follow, in the statute, other pertinent provisions: (1) authorizing the railroad, if dissatisfied with the plans and specifications submitted by the State Highway Commissioner, to petition the State Corporation Commission, setting out its objections thereto and recommending plans and specifications in lieu thereof, and authorizing the Commission to hear the complaint, solely as to the plans and specifications, and to approve those submitted by the Highway Commissioner, or others in lieu thereof; (2) undertaking to make it the railroad's duty, in such event, to furnish materials and construct in accordance with the plans and specifications approved by the Corporation Commission; and (3) purporting to impose on the railroad one-half the total cost of the work done both by it within, and by the Highway Commissioner without, the right of way limits, and the obligation to maintain the portion within the right of way lines, except the surface of the roadway.

There is no provision for appeal by the railroad to the Corporation Commission or to any other forum for review

of the fundamental question whether public safety and convenience require the elimination of the grade crossing. There is no denial by appellee, there never has been denial by appellee, by the Corporation Commission, or by the Supreme Court of Appeals of Virginia, in any of the proceedings below, that the Highway Commissioner's *ex parte* determination of that question is final and is made final by the statute. And it is the determination of that question which results in the *taking vel non* of the railroad's property. The determination of the choice of the particular plans for the structure which the railroad is required to build, the only question of which the Corporation Commission is given review, affects not the *taking vel non* of the railroad's property but only the extent to which and the form in which it is taken.

VI.

PROCEEDINGS BELOW.

Acting solely upon the supposed authority of the said statute, the relator appellee, without giving notice to the appellant and without affording it a hearing or any opportunity to contest, pursuant to no semblance of due process of law in the primary or procedural sense, taking no evidence, but following only the steps set out in the statute and acting in the forum of his own mind, determined by personal and administrative fiat that in his opinion public safety and convenience required the elimination of an existing grade crossing of State Highway No. 12 with appellant's railroad near Antlers, Virginia, and the substitution in lieu thereof of an overhead highway crossing over the track and right of way of appellant. (R. 60, 64.)

Having made that determination, which we have already seen the statute undertakes to make final, without notice or hearing or procedure of any sort, he thereupon gave appellant notice in writing, dated January 7, 1931, that

he had formed that opinion and made that determination, with which notice he submitted to appellant plans and specifications for the work, and in which notice he called upon appellant to "proceed forthwith to provide the equipment and materials and construct the overhead crossing in accordance with the plans and specifications herein submitted, within the right of way limits." (R. 61, 64.)

Appellant replied to that notice and requirement by letter dated January 20, 1931 (R. 62, 65), in which it said that it did not agree with the Highway Commissioner's opinion that the public safety and convenience required the said elimination construction, asserted the unconstitutionality of the statute, and advised that "unless and until it should be finally determined by the courts that it is a valid statute, this company cannot recognize that it is under any legal duty to provide equipment and materials or to construct an overhead crossing, as directed by your letter of January 7th."

The Highway Commissioner thereupon, without other intermediate handling, filed a complaint against appellant in the State Corporation Commission of Virginia, seeking an order of the Commission to compel appellant to perform the supposed "duty," asserted to have been imposed upon appellant by the foregoing acts of the Highway Commissioner under the Act of 1930. (R. 60-65, incl.)

The complaint alleged: that the Highway Commissioner, acting under the Act of 1930, had officially ascertained and determined that the elimination of the grade crossing and the substitution of the overhead crossing was necessary for public safety and convenience; that he had given this appellant notice of that determination and had submitted plans and specifications as required by the Act; that it thereupon became the legal duty of appellant to provide all equipment and materials and to construct the overhead accordingly; that he had called upon it to do so; that appellant had failed and refused to obey and perform said

duty, asserting that the statute was unconstitutional; that the cost of the work when done would be divided half and half between the commonwealth and appellant as provided in the Act; that the Corporation Commission had constitutional and statutory jurisdiction *to receive the complaint, to ascertain and determine whether appellant had failed or refused or was failing or refusing to comply with said duty, and to impose fines and otherwise enforce performance by it of said duty.* It prayed that appellant be required to perform said alleged duty.

Appellant demurred to said complaint, on the grounds, as specified and elaborated in the demurrer (R. 66-68), that the complaint did not state a cause of action in that the Act of 1930 was unconstitutional, null and void, as denying primary or procedural due process of law, in violation of the due process clauses of the 14th Amendment to the Constitution of the United States and of Article 1, Section 11, of the Constitution of Virginia, in the respects detailed in the demurrer and summarized in appellant's Jurisdictional Statement.

The federal constitutional question was thus squarely, explicitly, and in detail raised in the outset by the demurrer.

There was no issue of fact for the Corporation Commission. It had for decision only the squarely raised legal issue as to the constitutionality of the Act of 1930 and of the acts of the Highway Commissioner thereunder, and whether any constitutionally enforcible legal duty had been imposed thereby on appellant.

No question was raised by appellant of the substantive police power to make reasonable and not purely arbitrary requirements, in the interest of public safety and convenience, requiring uncompensated obedience by railroads by contributing their own property and work to construction of grade crossing elimination structures reasonably necessary to protect the public, *provided such requirements are made with due compliance with procedural due process of*

law. We deny the constitutional power to delegate to an administrative officer or board the power to make such a requirement, and to make it final, without notice, without hearing, without evidence, without any semblance of procedural due process, by administrative fiat based solely on his *ex parte* opinion, as the Act of 1930 undertakes to delegate the power to the Highway Commissioner.

The Corporation Commission took the constitutional question as properly raised on the complaint and demurrer and, after argument and reargument, and holding the case under advisement nearly a year, from March 30, 1931 (R. 69), to March 8, 1932, finally handed down an elaborate 98 page opinion (R. 71-170), in which, although admitting that it would be unconstitutional for a statute enacted under the taxing power, under the power to impose assessments for public improvements, and under other state powers, to deny notice and hearing and to delegate to an administrative officer or board such essentially arbitrary powers to act without procedural protection, yet held that the police power, particularly that aspect of it applied to grade elimination requirements, is so broad and untrammelled in scope as not to be subject to those procedural requirements of due process which the 14th Amendment imposes as to similar exercises of all other branches of the state's power.

It overruled the demurrer and, there being no issue of fact raised, ordered appellant to forthwith proceed to comply with the Highway Commissioner's requirement. However, it suspended its own order to allow appeal. (R. 69-70.)

On appeal, the Supreme Court of Appeals of Virginia treated the federal constitutional question as substantial, as properly raised, and decided the question in favor of the validity of the assailed statute, affirming the Corporation Commission by a divided court, Campbell, C. J., and Epes, J., dissenting (R. 174-192). The affirmed order has been stayed by supersedeas pending this appeal (R. 198-199).

VII.

ARGUMENT.

1.

There Can Be No Question that Appellant Has Pursued a Proper Remedy.

The federal constitutional question here raised was the same in part as that presented by the plaintiff in the recent case of *Investors' Syndicate v. Porter*, 52 F. (2d) 189, and there sustained by the District Court for the District of Montana, three judges sitting, and which holding this Court on appeal did not pass upon on the merits, 286 U. S. 461, 287 U. S. ——, 77 L. ed. (adv.) 166, because this Court held that the plaintiff, appellee, had not exhausted his administrative remedies before applying for injunctive relief in equity. As we read the opinions in that case, all the implications are that the plaintiff's constitutional question of primary due process under the 14th Amendment had merit (see 286 U. S. 469) but that he had sought the extraordinary relief of equity too soon.

No such situation exists here. Appellant here has not sought equitable relief to enjoin the acts and requirements of the state authorities. It has refused to comply with the requirement and the state officer has sought his administrative, quasi-judicial, or judicial remedy before the Corporation Commission to enforce compliance. There it was proper for appellant to, indeed it was its duty to, defend upon its constitutional defense. This it did. Its defense, properly raised, being determined against it, it followed the only course open to it, appeal to the Supreme Court of Appeals of the State. That court having determined the constitutional question against it, appellant's only course is to seek review here on appeal.

The suggestion is contained in appellee's statement opposing jurisdiction that since this case is on demurrer and since there is no evidence offered that the Highway Commissioner's requirement is in fact "arbitrary, oppressive, or confiscatory," no case is made of unconstitutionality under the 14th Amendment, and that "it is not necessary for notice and hearing to be accorded by the statute to prevent arbitrary, oppressive or confiscatory exercise of the power conferred by the statute upon the Highway Commissioner; because if the power is abused 'equity's long arm will stay his hand.'"

This overlooks the distinction between want of due process in the primary or procedural sense and want of due process in the substantive sense.* The assault here is not upon an order, entered under a valid statute, as being substantively unreasonable and so going beyond the substantive limitation on the police power of reasonableness. The assault is upon the constitutionality of the statute itself, and acts thereunder, in denying notice and hearing and the procedural protections which must be provided, and without which any final order or requirement by an administrative board or officer resulting in deprivation of property is necessarily arbitrary as matter of law.

If the suggestion means that appellant cannot complain of the unconstitutionality of the statute, as denying primary due process of law, in this legal proceeding upon demurrer, because, although procedural due process is denied by the statute and by the official acts thereunder, nevertheless the Highway Commissioner may peradventure have made a requirement which is reasonable in fact, regardless of his denial of notice and hearing and failure to follow any known legal procedure, and because if not so reasonable in fact appellant could go into equity to enjoin enforcement, then the suggestion answers itself. The

*See *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673, for apt treatment of the distinction.

same answer would apply to every instance of a statute delegating arbitrary powers to an administrative official to act without notice and hearing, without the procedural protection included within the meaning of due process. None of the many decisions of this Court holding such statutes unconstitutional could have ever been so decided, if that suggestion be an answer, since the courts of equity are always open to redress wrongs, yet courts of law consistently determine such statutes to be unconstitutional as denying primary due process.

If the suggestion means that appellant could not properly litigate its constitutional question in a legal proceeding on demurrer because appellant may have another adequate remedy in equity, then it is an inversion of the rule. Equity withholds relief where there is an adequate remedy at law, but we have never before heard it suggested that law will withhold a legal remedy, or will refuse decision upon a properly raised constitutional question, because perchance there may be an equitable remedy.

But there was no equitable remedy here. When the Highway Commissioner made his requirement, if the appellant had then gone into equity to restrain enforcement on the same constitutional grounds here asserted, it would have been met with the inescapable answer that equity was without jurisdiction because appellant had an adequate remedy at law, to wit, to refuse to obey the requirement, await the bringing by the Highway Commissioner of a proceeding before the Corporation Commission to enforce the requirement, and there defend on its assertion of unconstitutionality.

2.

It is Clear from the Decisions that a Statute Such as Here Involved Would Be Void Under the 14th Amendment if Passed Under Any Branch of the State's Power Other Than the Police Power.

There can be no question that in the exercise of the power to tax a state cannot constitutionally delegate to an administrative board or officer the power to make a final assessment without notice or hearing, without right to contest pursuant to recognized modes of procedure. The law itself must require notice and hearing as matter of legal right and no notice and hearing in fact, as matter of grace or favor or discretion, will suffice. *Security Trust & Savings Co. v. Lexington*, 203 U. S. 323; *Central Ga. R. Co. v. Wright*, 207 U. S. 127; *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144; *Coe v. Armour Fertilizer Works*, 237 U. S. 413; *Turner v Wade*, 254 U. S. 64.

The same is equally true of the power of the state to impose assessments for public improvements. The distinction is clearly drawn that, whereas the legislature may itself act without notice or hearing to the individual, all the people being represented and in theory heard in the legislature's own proceedings, yet when the legislature undertakes to delegate to an administrative board or officer the power to act in a particular instance the inquiry becomes, as this Court significantly said in *Parsons v. District of Columbia*, 170 U. S. 45, "in its nature judicial in such sense that the property owner is entitled to a hearing, or to notice or an opportunity to be heard." To the same effect, *Embree v. Kansas City & L. B. District*, 240 U. S. 242; *Withnell v. Ruecking Construction Co.*, 249 U. S. 62; *Browning v. Hooper*, 269 U. S. 396; *Stuart v. Palmer*, 74 N. Y. 183.

The legislature cannot constitutionally delegate its essentially legislative and sovereign power to impose regulations resulting in uncompensated obedience and taking of

property without notice and hearing and without those procedural protections thrown around the citizen by the 14th Amendment. *Eubank v. Richmond,* 226 U. S. 137; *Browning v. Hooper,* 269 U. S. 396; *Washington, ex rel. Seattle Title Trust Co. v. Roberge,* 278 U. S. 116.

Heretofore the Supreme Court of Appeals of Virginia has consistently recognized these procedural requirements of the due process clause. *Violett v. Alexandria,* 92 Va. 561; *Thompson v. Smith,* 155 Va. 367.

In *Violett v. Alexandria, supra,* the Virginia court said:

> "It is not enough that the owners of the property affected by a local assessment may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them a right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such law that the assessment has, in fact, been fairly apportioned. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice. Stuart v. Palmer, 74 N. Y. 188."

That is almost verbatim the language of this Court in *Coe v. Armour Fertilizer Works,* 237 U. S. 413.

In *Thompson v. Smith,* 155 Va. 367, the Virginia court held unconstitutional an ordinance of Lynchburg which, after providing for issuance of licenses to drive motor vehicles to persons passing examination, undertook to delegate to the Chief of Police power to revoke the license of "any driver who, in his opinion, becomes unfit to drive an automobile on the streets." That court there said:

> "It is a fundamental principle of our system of government that the rights of men are to be determined by

> the law itself, and not by the let or leave of administrative officers or bureaus. The principle ought not to be surrendered for convenience or in effect nullified for the sake of expediency. It is the prerogative and function of the legislative branch of the government, whether state or municipal, to determine and declare what the law shall be, and the legislative branch of the government may not divest itself of this function or delegate it to executive or administrative officers."

Other cases illustrating and expounding the limitation imposed by the due process clause of the 14th Amendment, forbidding the delegation by the legislature to administrative boards or officers of its own sovereign and essentially legislative power to act without notice and hearing, to make law, are: *Yick Wo v. Hopkins*, 118 U. S. 356; *Tracy v. Ginzberg*, 205 U. S. 170; *Wagner v. Leser*, 239 U. S. 207; *United States v. Colgate Grocery Co.*, 255 U. S. 81; *Truax v. Corrigan*, 257 U. S. 312; *Wichita R. R. & L. Co. v. Public Utilities Commission*, 260 U. S. 48; *Adkins v. Children's Hospital*, 261 U. S. 525; *Small Co. v. Sugar Refining Co.*, 267 U. S. 233; *Connally v. General Construction Co.*, 269 U. S. 385; *Cline v. Frink Dairy Co.*, 274 U. S. 445; *Marx v. Maybury*, (D. C., Wash., 1929) 36 F. (2d) 397.

This Court clearly defined the limitation upon the delegation to administrative officers or boards of legislative powers in *Wichita R. R. & L. Co. v. Public Utilities Commission*, 260 U. S. 48, 59, where it was said:

> "In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, *must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function.* It is a wholesome and necessary principle that such an agency *must pursue the procedure and rules enjoined*, and show a substantial compliance therewith, to give validity to its action." (Italics added.)

The substantive due process limitation of reasonableness, where power is delegated to administrative boards or officers, would amount only to idle verbiage without the adjective due process requirement of notice, hearing, and enjoined forms of procedure.

Yet in the Act of 1930 the State of Virginia undertakes to delegate to an individual administrative officer the power to deprive a railroad of its property, to select which railroad shall be so deprived, to select which grade crossings it shall be required to eliminate, upon a finding of public safety and convenience, without notice, without hearing, without evidence, and without enjoining upon him any semblance of procedure whatsoever, but expressly authorizing him to make the controlling determination upon the sole basis of his arbitrary, *ex parte,* purely personal opinion. No clearer example of an attempt to authorize taking of property by arbitrary administrative fiat could, we think, be found.

Under the similar limitation of the 5th Amendment Congress has no power, under its broad authority to regulate interstate commerce, to empower the Interstate Commerce Commission to make a final determination without notice, without hearing, without evidence or without sufficient evidence, by administrative fiat. *Interstate Commerce Commission v. Louisville & Nashville R. Co.,* 227 U. S. 88. This Court there said:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair, if the finding was contrary to 'the indisputable character of the evidence.'"

That case is, we submit, the complete answer to the argument of appellee that the Virginia Act is constitutional because, although it authorizes appellee to act without notice, without hearing, by fiat, without following any semblance of enjoined procedure, and although he so acted, yet for all that appears of record he may in the particular instance involved have acted beneficially and reasonably in fact. In law his acts were purely arbitrary, and under a statute expressly undertaking to authorize purely arbitrary action.

We think it is a misreading of this Court's decisions to draw from them the conclusion that the state's police power is any freer from the procedural limitations of the due process clause of the 14th Amendment than is the Congress's power to regulate commerce from the similar limitations of the 5th Amendment.

3.

Neither the Fact that the Statute Involved Was Passed as an Exercise of the State's Police Power nor the Fact that it Was Passed as an Exercise of the Particular Branch of the Police Power Under Which the State Has Substantive Power to Require Grade Crossing Eliminations at the Expense of Railroads Makes it Valid, Since it Denies All the Procedural Protection of Due Process in the Primary Sense.

Running throughout this case, in the opinion of the Corporation Commission, in the majority opinion of the Court of Appeals of Virginia, and in the Jurisdictional Statement and Motion to Dismiss or Affirm of Appellee, there is the

admission that a statute such as the Act of 1930 would be unconstitutional as denying primary due process, if passed in the exercise of the state's taxing power, its power to assess benefits, any other of its powers, in fact, *except the police power*, but the position is that the police power, and especially that aspect thereof under which the state may require railroads to eliminate grade crossings at their own expense in whole or in part, is so broad and untrammelled as to be *sui generis*, and that under such power the state may competently delegate to an administrative officer the power to make a final regulation and requirement, without notice, without hearing, without evidence, without following any prescribed procedure. It is said that because this is done under the police power it is not a "taking" of property but is the mere making of an "administrative regulation."

See the discussion by the Corporation Commission (R. 119-129) admitting the procedural requirements of notice and hearing and forms of procedure as declared in the cases arising under the power to tax and under the power to assess benefits, etc., but concluding with this significant statement (R. 128-129):

> "The defendant, in referring to *New York, etc., Railway Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Chicago, etc., Railway Co. v. Nebraska*, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481; and *Erie Railway Co. v. Public Utilities Commissioners*, 254 U. S. 394, 65 L. Ed. 322, points out that the statutes in such cases provided for notice to or an opportunity to be heard by the railroad company before it should be required to eliminate grade crossings. It is true that the statutes involved in such cases did require such notice, and the courts in considering such questions and the contention that the statutes deprived the defendant of property without due process of law, referred to the fact that the statutes did provide for notice or an opportunity to be heard, but the fact that they did so is not to be taken as holding that notice to or an opportunity to be heard was essential to due process of law.

"While nearly all of the statutes involving the alteration or abolition of grade crossings, whenever in the opinion of the administrative body the public safety or convenience requires such alteration or abolition, provide for a hearing, yet there is no case which holds that notice of a hearing and an opportunity to be heard are absolutely necessary.

"When the General Assembly conferred upon the State Highway Commissioner—who is an arm of the State—the function to require the elimination of an existing grade crossing and the substitution therefor of an overhead or underpass crossing, whenever such elimination and substitution in his opinion becomes necessary for the public safety or convenience, it had authority to prescribe the course to be pursued, and if it had required notice to be given to the railroad company, the State Highway Commissioner would have to comply with such requirement, but it has not so required, and it was not essential that it do so."

The same admission and the same attempted distinction run throughout the opinion of the Court of Appeals (R. 174-192) and it said succinctly on R. p. 189:

"Was notice to the railway company necessary before the commissioner undertook to ascertain the character of the crossing? It was not unless property in some proper sense was to be taken."

Hence the whole opinion of that court is grounded upon the postulate that no *taking* of property "in the proper sense" is involved. If a taking be involved the statute is admittedly invalid under the 14th amendment.

After admitting that such a statute would be invalid if passed under the state's tax power, its rate making power, its power to assess for benefits for public improvement, its power to require railroads to extend and build tracks, its power to regulate ordinary business (the business of a railroad being apparently deemed a species of *caput lupinum*) and after attempting to distinguish cases relied on by appellant from a case under the police power to regulate

railroads at grade crossings (Appellee's Jurisdictional Statement, heading "Appellant's Cases Differentiated"), appellee says, "No one would question that both notice and opportunity to be heard are required in this class of cases."

It is true that in the earlier decisions by this Court following the adoption of the Civil War Amendments there were broad statements indicating that the police power of the states was in no wise restrained or limited by the 14th Amendment. These statements started with *Barbier v. Connolly*, 113 U. S. 27, 31, and are repeated in *Mugler v. Kansas*, 123 U. S. 623; *Coppage v Kansas*, 236 U. S. 1; *Lochner v. New York*, 198 U. S. 45, and in a host of other cases.

Characteristic is the statement quoted by appellee from *New Orleans Public Service Co. v. New Orleans*, 281 U. S. 682, that:

> "It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exercise of the police power is not a taking of property without due process of law."

The first observation as to those broad statements is that they deal with the substantive power of the state, not with the procedural limitations of the 14th Amendment.

The next is that the very use of the word "legitimate" implies that while the state has the substantive power it can only exercise it "legitimately." It is not a "legitimate exertion of the police power" for the legislature to delegate its exercise to an administrative officer without enjoining notice, hearing, and due procedural steps.

But the old idea, here revived by appellee, that the police power of the state is wholly unrestrained by the 14th Amendment, and based upon general language in early cases, is now in the limbo of forgotten ideas. In *Adkins v. Children's Hospital*, 261 U. S. 525, quoting from *Lochner v. New York*, 198 U. S. 45, this Court said:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid no matter how absolutely without foundation the claim might be."

The leading case of *Yick Wo v. Hopkins,* 118 U. S. 356, itself dealt with an exercise of the state's police power, and this Court there said, of a delegation of an arbitrary personal power to administrative officers indistinguishable in essential character from the power conferred on the Highway Commissioner by the Virginia Act of 1930:

> "The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

That and similar cases are attempted to be distinguished by appellee on the ground that they dealt with the police power to regulate "ordinary businesses" whereas the Virginia statute applies to the business of a railroad. That even a railroad's property is not *caput lupinum* is clear. *Chi., M. & St. P. R. Co. v. Tompkins,* 176 U. S. 167, wherein this Court said:

> "When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protection clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated."

We have seen that the whole predicate of the decision below is that this statute is not in conflict with the 14th Amendment because no "taking" of the railroad's property is involved in the requiring of uncompensated obedience to an order to build an elimination structure to separate grades of a railroad-highway crossing. As authority for this predicate there are cited the many cases dealing with the substantive validity of grade crossing elimination requirements. *New York, etc., R. Co. v. Bristol,* 151 U. S. 556; *Chi., B. & Q. R. Co. v. Nebraska,* 170 U. S. 57; *Northern Pac. R. Co. v. Duluth,* 208 U. S. 583; *St. Paul, etc., R. Co. v. Minnesota,* 214 U. S. 497; *C. I. & W. R. Co. v. Connersville,* 218 U. S. 336; *Chi., etc. R. Co. v. Minneapolis,* 232 U. S. 430; *Great Northern R. Co. v. Clara City,* 246 U. S. 434; *Erie R. R. Co. v. Public Utilities Commissioners,* 254 U. S. 394; *Southern R. Co. v. Durham,* 266 U. S. 178; *Lehigh Valley R. Co. v. Board of Commissioners,* 278 U. S. 24; *New Orleans Public Service Co. v. New Orleans,* 281 U. S. 682.

Those cases held only that it was within the substantive power of the states to make such requirements. None of them has held that it is competent for the state to delegate that power to an administrative board or officer, without requiring notice and hearing and without enjoining a necessary and appropriate procedure to comply with primary due process of law. A careful examination of those cases will show that in every instance involving statutory delegation to a board or officer the statute made most careful and full provision for notice, hearing, and review on the merits, and that in every instance such provisions were fully complied with.

The *Bristol case* involved a statute which made detailed provisions for notice and hearing before the board made its requirement, and for full review on the merits thereafter. It complied with every element of procedural due process which the Virginia statute lacks. The same is true of the *Erie case,* the *Lehigh Valley case,* and all the

others wherein the delegation of power to act was to an administrative board or officer. In the famous *Erie case* (see the report thereof in 89 N. J. L. 57, 98 Atl. 13, 28; and in 90 N. J. L. 672, 673, 677, 694, 714, 729, 103 Atl. 1051-1053, 1055) not only did the statute provide for notice, hearing, and full review on the merits, but the requirement was imposed only after petition, notice, answer, and 18 hearings before the board lasting over two years, then there was a full rehearing before the board, and full review on the merits by the Supreme Court and by the Court of Errors and Appeals.

There was no suggestion of lack of due process in the primary or procedural sense in that case. And when this Court said therein, in the picturesque phrase of Mr. Justice Holmes, "That the states might be so foolish as to kill the goose that lays golden eggs for them has no bearing on their constitutional rights," it seems clear that it was speaking only of the substantive scope of the power, and that it did not mean to intimate that the state may delegate to a board or officer the power to "kill the goose" without notice or hearing, without evidence, without any form of procedure, but merely by final administrative fiat based solely on *ex parte* opinion.

The *Lehigh Valley case, supra,* contains a very strong declaration that even the substantive power is not without strict constitutional limitations of reasonableness and it contains no intimation whatsoever that the power is exempt from the well understood procedural limitations of the 14th Amendment. *A fortiori* there must be due process in the procedural sense.

The cases involving validity of municipal ordinances, laws enacted by the municipal branch of the legislature, such as *Chicago, etc., R. Co. v. Nebraska,* 170 U. S. 57, *Southern R. Co. v. Durham,* 266 U. S. 178, and *New Orleans Public Service Co. v. New Orleans,* 281 U. S. 682, are in no way pertinent to the question raised on this appeal, very different principles there applying.

And yet appellee asserts in his Statement Opposing Jurisdiction that those grade crossing elimination cases have expressly held that no notice or hearing is required by the 14th Amendment to be provided for in a statute delegating the grade crossing elimination power to administrative boards or officers. He says:

> "In the earlier cases it was vigorously asserted by the railroads that notice and a hearing was required and had been denied them but it was expressly held that no notice or hearing was required. The point has not been urged in the later cases. It was embalmed in the earlier cases and should not be revived."

If that be true, it is important that this Court make it clear that the 14th Amendment does not impose upon the police power to require eliminations of grade crossings any of the well settled procedural guaranties which it throws around the citizen to protect against purely arbitrary exercises of other phases of the state's power. This would, we think, be news to the profession.

Certainly the legislatures of the states have not understood that it was competent for them to delegate to administrative boards or officers the power to make final grade crossing elimination requirements without notice, without hearing, without evidence or procedure of any kind, based on arbitrary opinion, by administrative fiat. The statutes have quite uniformly made careful and complete provisions enjoining notice, hearing, and orderly procedure and full review on the merits.*

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*Statutes have been found in 43 states delegating to administrative boards, commissioners, or officers the power to enter orders requiring grade crossing elimination structures to be built by railroads at their own expense in whole or in part.

Of these, 31 clearly and expressly provide for and require notice and hearing prior to the entry of the order. *Arkansas Dig. Stat. (Crawford & Moses, 1921), sec. 1644; California Gen. Laws (Deering, 1931), Act 6386, sec. 43 (b); Colorado Comp. Laws 1921, sec. 2940; Connecticut Gen. Stat. 1930, sec. 3670; Delaware Laws 1917, ch. 63, sec. 6, at p. 177; Idaho Code Ann. (1932), sec. 60-304; Illinois Rev. Stat. (Smith-Hurd, 1929), c. 111 2/3, sec. 62; Indiana Ann. Stat. (Burns, 1926), sec. 12841; Iowa Code (1931), secs. 8020, et seq.;*

The General Assembly of Virginia has fully complied with these procedural requirements in the statutes conferring power on the Corporation Commission to regulate railroads in all other respects. Code 1930, sections 3711, 3720, 3726, carefully guard due process procedural requirements by providing in detail for notice and hearing before that Commission may act. Section 3723 requires it to administer the common and statute law of evidence in like manner as courts. And section 3734 grants appeal and full judicial review as matter of right as to every order entered.

Kentucky Stat. (*Carroll, 1930*), *sec. 4356Z-2; Maine Rev. Stat.* (*1930*), *ch. 27, sec. 39, pp. 516, 517; Maryland Code Ann.* (*Bagby, 1924*), *art. 23, sec. 240, id.* (*Bagby, Supp. 1929*), *art. 91, secs. 38 A to 38 G; Massachusetts Gen. Laws* (*1932*), *ch. 159, sec. 65, et seq.; Michigan Comp. Laws* (*1929*), *sec. 3943, at p. 1576; Minnesota Stat.* (*Mason, 1927*), *sec. 4742; Nebraska Comp. Stat.* (*1929*), *sec. 75-517, 75-518; Nevada Comp. Laws* (*Hillyer, 1929*), *sec. 6118, sec. 6125; New Jersey Comp. Stat.* (*Supp. 1931*), *sec. 167-30, New Jersey Comp. Stat.* (*Supp. 1925-1930*), *sec. 167-34; New Mexico Stat. Ann.* (*Courtright, 1929*), *sec. 116-1203; New York Railroad Law* (*as amended 1928*), *sec. 91; Ohio Gen. Code Ann.* (*Throckmorton, 1926*), *sec. 6956-24; Oklahoma Stat.* (*Harlow, 1931*), *secs. 3660, 3661; Oregon Code Ann.* (*1930*), *sec. 62-704; Pennsylvania Stat. Ann.* (*Purdon, 1930*), *Tit. 66, sec. 571; Rhode Island Gen. Laws* (*1923*), *ch. 251, sec. 39; South Dakota Comp. Laws* (*1929*), *sec. 9646-A; Utah Comp. Laws* (*1917*), *secs. 4811, 4827; Vermont Laws 1923, No. 95, p. 101; Washington Code Ann.* (*Pierce, 1929*), *sec. 5641; Wisconsin Stat.* (*1931*), *secs. 84.05, 195.29, 195.30; Wyoming Rev. Stat. Ann.* (*1931*), *secs. 94-140, 94-142.*

Five states, Alabama, Florida, Louisiana, Montana, and Texas, appear to have no such statutes.

The statutes of eight states, Arizona, Georgia, Mississippi, Missouri, New Hampshire, North Carolina, South Carolina, and West Virginia, may be said to be in a kind of "twilight zone" *quoad* requirement for notice and hearing. They do not expressly require notice and hearing before the commission or board makes its order, but they guarantee full review on the merits, not a mere review limited to objections to particular plans, as in the Virginia statute. Hence there must be notice and hearing before the requirement becomes *final* on the merits. *Arizona Rev. Code* (*1928*), *sec. 700; Georgia Code Ann.* (*Michie, Supp. 1930*), *secs. 2677* (*16*), *2677* (*18*), *2677* (*26*); *Mississippi Code Ann.* (*1930*), *sec. 5007; Missouri Stat. Ann., secs. 5177, 5233; New Hampshire Public Laws* (*1926*), *ch. 249, secs. 9, 11; North Carolina Code Ann.* (*Michie, 1931*), *secs. 1041, 1048, 1097; South Carolina Civ. Code* (*1932*), *secs. 8437, 8438, 8444, 8445; West Virginia Code Ann.* (*Michie, 1932*), *secs. 1569, 1570, 1571, 1572.*

In only four of the states, Kansas, North Dakota, Tennessee, and Virginia, do the statutes clearly fail to require notice and hearing before the order becomes final. *Kansas Rev. Stat.* (*Supp. 1931*), *sec. 68-414; North Dakota Comp. Laws Ann.* (*Supp. 1925*), *sec. 4688a 11; Tennessee Code* (*1932*), *sec. 2638; Virginia Code Ann.* (*Michie, 1930*), *sec. 3974a.* And in none of those states, except in the instant case in Virginia, have we found the question raised.

It could only have been by an oversight that the Virginia legislature entirely failed to make any such provisions in delegating power to the Highway Commissioner by the Act of 1930 here in question.

In the recent case of *Norwegian Nitrogen Products Co. v. United States*, decided Feb. 6, 1933, this Court clearly distinguished between what is required in procedure in a statutory hearing by the Tariff Commission, which only advises and recommends to the executive, and the traditional procedural requirements of notice and full hearing, action only upon competent and sufficient evidence, etc., applicable to the action of delegated boards and officers such as the Interstate Commerce Commission, the state commissions regulating carriers and utilities, etc. It said:

> "Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain, is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditional forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. • • • It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. They may be challenged in the courts if the effect is to reduce charges to the point of confiscation. Smyth v. Ames, 169 U. S. 466. They may be challenged for other reasons when they are without evidence supporting them and are merely arbitrary edicts. Interstate Commerce Commission v. Union Pac. R. R. Co., 222 U. S. 541; Manufacturers Ry. Co. v. United States, 246 U. S. 457; Nor. Pac. v. Dep't Public Works, 268 U. S. 39, 44; Chi. & P. Ry. Co. v. Public Utilities Comm., 244 U. S. 344, 351. Cf. Sharfman, The Interstate Commerce Commission, Vol. II, p. 424. *The 'hearing' that such commissions are to give must be adapted to the consequences that are to follow, to the attack and review to*

which their orders will be subject. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 93; St. Louis Ry. Co. v. Interstate Commerce Commission, 264 U. S. 64; Atchison, T. & S. F. R. Co. v. United States, 264 U. S. 248. *The Commerce Act, as it stands today, and kindred statutes in the States, are instinct with the recognition of a duty to give a hearing of such a kind that the courts will understand why a commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision.*" (Italics added.)

We submit that that language could not have been written by a court which has declared and maintains the law to be that it is competent for the legislature of a state to delegate to an individual administrative officer or to a board such a power as the Act of 1930 undertakes to confer on the Virginia Highway Commissioner.

His action under that statute is not advisory or recommendatory; it ordains. It impinges upon appellant in exactly the same way as an order of the Interstate Commerce Commission requiring automatic fire doors or fixing rates or an order of a state commission requiring train connections or the building of an industrial track. The Highway Commissioner's *ex parte* fiat imposes upon appellant, by the terms of the statute, a ripened and mandatorily enforcible requirement to spend its money, do construction work, and devote to public purposes part of its property.

Yet no reviewing court could possibly determine what elements entered into the formulation of his "opinion" as to public safety and convenience or what considerations, if any, determined or influenced his fiat.

While the requiring of a railroad of uncompensated obedience to an order for the elimination at its own expense of a dangerous grade crossing is not a "taking" of property without due process of law in the substantive sense, if the order be substantively reasonable and if it be entered as a "legitimate" exercise of the police power under a

valid statute giving the procedural due process protection required by the primary sense of the due process clause of the 14th Amendment, we submit that it is idle to say, as appellee says and as the court below said, that there is involved in the instant case no "taking" of property *qua taking* but only an "administrative regulation." *Chi., M. & St. P. R. Co. v. Minnesota,* 134 U. S. 416; *Missouri P. R. Co. v. Nebraska,* 217 U. S. 196; *Washington, ex rel. Oregon R. & N. Co. v. Fairchild,* 224 U. S. 510; *Great Northern Ry. Co. v. Minnesota,* 238 U. S. 340; *Chi., M. & St. P. R. Co. v. Board of Railroad Commissioners,* 76 Mont. 305, 247 Pac. 162.

We submit that the case of *Chi., M. & St. P. R. Co. v. Minnesota,* 134 U. S. 416, is squarely in point to the question here raised. There a police power statute of Minnesota, quite comparable to the Virginia statute here assailed, undertook to delegate to the railroad commission of that state the power to regulate and fix rates and charges without notice and hearing, by administrative fiat, and to make the rates so fixed final and subject to no judicial review on the merits. No provision of that statute enjoined notice and hearing or required the commission to take or consider evidence or to follow any required procedure. It undertook to authorize the commission, on its own *ex parte* consideration, merely to publish the rates, just as the Virginia statute undertakes to authorize the Highway Commissioner, merely on his *ex parte* opinion, to determine that the public safety and convenience require that the railroad build an overhead crossing or underpass. And it undertook to make those rates final, just as the Virginia statute undertakes to make final the Highway Commissioner's finding of public safety and convenience. The cases are indistinguishable in principle. Appellee seeks to distinguish them on the ground that one involved the rate regulation aspect of the police power while the other involves the grade crossing elimination aspect of that power, which is, we submit,

no distinction at all. The one aspect must be as subject as the other to the procedural requirements of due process.

The question of constitutionality arose procedurally there as it does here. After the commission made its *ex parte* rates and the carrier refused to put them in force, the commission brought mandamus to compel performance, and the carrier defended on unconstitutionality. The state court held, just as it is here held, that there was no fact to traverse except the asserted violation of law in refusing to put in effect the commission-made rates. In the course of an elaborate discussion of the constitutional question, this Court said:

> "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find, and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, *in fact, nothing which has the semblance of due process of law;* and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by agent, and the commission investigated the rates charged by the company, for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at." (Italics added.)

Just so, in our case, the Act of 1930 provides for "nothing which has the semblance of due process of law."

In every rate case since the *Minnesota case* and since *Smyth v. Ames,* 169 U. S. 466, in which the question of procedural due process has been raised the same law has been declared.

In *Missouri P. R. Co. v. Nebraska, supra,* this Court held violative of the 14th Amendment a statute of Nebraska which undertook to require railroads, at their own expense, and without any provision for notice and hearing, to construct side tracks to any grain elevator, of not less than 15,000 bushels capacity, which might demand such track. It was sought to sustain the statute as a valid exercise of

the police power. This Court treated it as being a police power statute, but said:

> "It is also true that the states have the power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the power commonly called the police power. But railroads, after all, are property protected by the Constitution and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for *taking* such property away. * * *
>
> "If the statute makes the demand (of the elevator company) conclusive, it plainly cannot be upheld. *If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act.*" (Italics added.)

And cf. the later case of *Chicago & N. W. R. Co. v. Ochs*, 249 U. S. 416, sustaining as a valid exercise of the police power an order of the Minnesota Commission, requiring a railroad to extend a side track to an industry, entered under a statute which fully complied with procedural due process requirements by providing for and guaranteeing notice and full hearing before the order was entered and full judicial review of the merits thereof thereafter. Distinguishing that statute from the one involved in the *Nebraska case*, this Court said:

> "The case of Missouri P. R. Co. v. Nebraska, 217 U. S. 196, * * * on which the railroad company relies, is plainly distinguishable. The (Nebraska) statute *made no provision for a preliminary hearing before an administrative body* and yet subjected the company to the risk of a fine of at least $500 if it awaited a hearing in court on the reasonableness of the demand. *Here there was provision for a full hearing before the Commission and also in the district court of the county.*" (Italics added.)

To the suggestion by appellee and the express holdings by the Commission and the court below, that no *taking* of property "in the proper sense" is here involved, the case of *Washington, ex rel. R. & N. Co. v. Fairchild*, 224 U. S. 510, would seem to be the conclusive answer. There this Court held that a delegated power, of exactly the same character as that undertaken to be delegated to the Highway Commissioner by the Virginia statute, was *not a power to make a mere administrative regulation but was a power to take railroad property.*

That again was a police power case. A statute of Washington undertook to authorize the railroad commission "after hearing to order that additional trackage or sidings be constructed and that additional connections be made." The statute contained full provision for notice and hearing before making of an order. It then expressly provided for proceedings in review in the superior court to "have such order reviewed and its reasonableness and lawfulness inquired into and determined." It contained, therefore, all those provisions which are utterly lacking in the Virginia statute. But it limited the reviewing court to a consideration of the evidence introduced before the Commission, rather than requiring trial *de novo*. After a full hearing before the Commission and after review in the state court, not *de novo*, but confined to the evidence before the Commission, the case came here for review of an order entered under the statute.

It was held that the statute complied with the procedural requirements of due process, that the review in the court was sufficient judicial review on the merits, although confined to the evidence taken before the Commission, since the carrier had full opportunity to offer all available evidence there, but on the merits this Court held the order invalid under the 14th Amendment as not supported substantively by sufficient evidence. While recognizing all the procedural requirements of due process which we here contend for,

the Court went further there and applied the substantive guaranty.

The first contention made in support of the order was the same which appellee here makes, *that no taking of property was involved, only an administrative regulation,* and that therefore no notice and hearing were necessary under the 14th Amendment. This Court answered that contention as follows:

> "The Commission's order requiring the Oregon Company to make connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money, and prevented it from using for other purposes the land on which the tracks were to be laid."

Similarly here, the *ex parte* requirement of the Highway Commissioner, entered under the supposed authority of the Act of 1930, would compel appellant to expend money and would prevent it from using for other purposes the land on which the bridge is to be built. *It cannot be deemed a mere administrative regulation. It is a taking of property.* No sound distinction can be made between a police power order requiring building a track connection and a police power order requiring building a highway overpass.

That a *taking* is here involved is plain also from the holding by this Court in *Great Northern Ry. Co. v. Minnesota,* 238 U. S. 340, wherein it was expressly held that an order of a state railroad commission requiring a railroad company to install and maintain scales at certain of its stations was a taking of property within the meaning of the 14th Amendment. It was said (p. 345):

> "Manifestly, if the order is enforced plaintiff in error's property will be taken. Whether this would be without due process of law depends upon the special circumstances."

Yet the whole theory of appellee and of the court below is that notice and hearing and traditional required procedure need not be provided for by the Virginia Act of 1930, under the 14th Amendment, because no taking of property is here involved, but only a mere administrative regulation.

For a very interesting state court decision exactly in point see *Chi., M. & St. P. R. Co. v. Board of Railroad Commissioners*, 76 Mont. 305, 247 Pac. 162, wherein the Montana court held violative of the procedural due process requirements of the 14th Amendment an entirely analogous statute undertaking to confer on the railroad commission power, without any provision for notice, hearing, or any sort of enjoined procedure, to order railroads to build industrial spurs. In a learned and careful opinion that court held that statute unconstitutional, upon the authority of many of the cases cited in this brief. We think this Court's attention was invited to that interesting and sound decision in the briefs in *Porter v. Investor's Syndicate*, 286 U. S. 461, 287 U. S. ——, 77 L. ed. (adv.) 166.

4.

Cases Relied on by Appellee Distinguished.

We have already seen that the grade crossing elimination cases relied on by appellee involved substantive, not procedural, due process, and that the decisions, in their expression, entirely support, rather than refute, our contention that such a statute, when delegating power to administrative boards and officers, must require notice and hearing and must enjoin sufficient forms of procedure, and that the administrative order must be subject to full judicial review on the merits.

The court below (R. 189) placed considerable reliance upon cases like *Goddard, Petitioner, etc.*, 16 Pick. 504, 28 Am. Dec. 259; *Lemon v. Rumsey*, 108 W. Va. 242, 150 S. E. 725; involving necessary emergency exercises of the police

power, such as to abate infections or vegetable diseases. They manifestly have no application here.

The greatest reliance is placed by appellee on *Health Department v. Trinity Church*, 145 N. Y. 32, and on the dicta in *Chi., B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, approving what was really but a dictum in the *Trinity Church case*. This is but an interesting illustration of the dangerous self-perpetuating tendency of dicta.

The statute involved in the *Trinity Church case* provided that all tenements in the City of New York less than twenty years old should forthwith be supplied with "Croton or other water," and that tenements over that age should be so supplied on or before January 1, 1889. In addition, it authorized the department of health to compel the owners of old tenements to install water facilities prior to the date when the act itself should become effective as to them, to wit, January 1, 1889.

Trinity Church owned certain old tenements built more than twenty years before the Act, which had no water supply. It was not required by the health department to install the water supply in obedience to the statute at any time prior to January 1, 1889, the final date at which the statute required all tenements, regardless of age, to be so provided. That final date passed, the statute become universally applicable to all tenements, with no discretion left in the health department to longer excuse compliance. And still Trinity Church had not obeyed the statute. Two years and nearly three months after the deadline of the statute made it applicable to all tenements, and, to wit, on March 30, 1891, the health department served a notice on Trinity Church requiring it within five days to obey the now universal obligation of the statute. The church refused to comply with the notice and contested in court the right to require it to install water supply at its own expense. Of course, the statute was held to be a reasonable police regulation, universally applicable to tenements, and valid.

The defendant, apparently as a mere make-weight, in addition to its principal contentions of want of power, did throw in a half-hearted contention that the notice of the health department denied procedural due process in that it did not provide for hearing. This contention was wholly without merit. The time during which the health department had any discretion to excuse or postpone compliance with the statute had long since passed. At the time of the notice all tenement owners were under the duty, imposed finally by the statute itself, to furnish the water supply. The notice by the health department imposed no duty on the defendant. It merely called its attention to the fact that it was violating the duty finally imposed by the statute and called on it to obey the law.

It is true that Judge Peckham, who wrote the opinion, went on to say, in language which is quoted and emphasized by appellee, that the requirement would have been valid, even though imposed directly by the health department without notice or hearing. But this language was pure dictum, because it was inapplicable to the situation then before the court, the requirement under attack by the church having been imposed directly by the legislature itself. In the language of Mr. Justice Curtis, speaking for the court, in *Carroll v. Carroll*, 16 Howard 275, 287, 14 L. ed. 936, the *Trinity case* affords "an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression."

Appellee attaches particular weight to the *Trinity case*, because a portion of the opinion therein was quoted with apparent approval by this Court in *Chi., B. & Q. R. Co. v. Nebraska*, 170 U. S. 57. That case involved the validity of a *city ordinance*—a legislative act—which required the railroad company to rebuild a grade separation structure. What is said by the Court in that case, therefore, must be taken to relate to the *facts then in issue*, to the validity of a *legislative enactment*, and not to an order of a subordinate

official attempting to take private property by administrative fiat, without notice to the property owner, without hearing as to the propriety or reasonableness of the taking, and without opportunity for judicial review. The most that can be said for the quotation that this Court made from the *Trinity case* is that it was a dictum by this Court, following a dictum of the New York court; in short, a dictum fashioned from a dictum. It may be said here, therefore, as was said in *Ex Parte Bakelite Corp.*, 279 U. S. 438, 455, 73 L. ed. 789, that:

> "This statement was purely an *obiter dictum*, because the question * * * was in no way involved. And any weight the dictum, as such, might have is more than overcome by what has been said on the question in other cases where there was need for considering it."

Another case cited and discussed in the opinion below, and relied on by appellee in his motion, is *Breiholz v. Board of Supervisors*, 257 U. S. 118, in which this Court had under review an Iowa statute which authorized a county board of supervisors to establish drainage districts, adopt systems of drainage, and to assess the lands benefited for the costs thereof. The statute made "elaborate provision" for notice to owners of lands to be affected by the creation of a proposed district, and for a hearing thereon. A district was created in the manner prescribed by the statute, after full notice and hearing. Thereafter, in pursuance of statutory authority, the board made necessary repairs to the drainage system, and assessed the cost thereof upon the lands in the same proportion that the original cost was apportioned. It was held that notice and hearing were not necessary before such repairs were undertaken. This simply means that government authorities have the power to make repairs to government property without according notice and hearing to taxpayers, even though such repairs may occasion additional taxes. It is difficult to see how this decision

affords any support to appellee's argument that a state official may consistently with due process of law compel a corporation to expend its money for a public work, without giving the corporation notice of the proposed taking and an opportunity to be heard on the question. Indeed, in that case the Court acknowledged that notice and hearing would be necessary before a *new* project could be undertaken, saying:

> "It is not necessary that we should consider whether a case can be imagined in which the ditches of a district might be enlarged, deepened, widened and lengthened to an extent such as to constitute a new construction and a *new taking of property, which would require a further notice and hearing before a new assessment for it could be constitutionally imposed*, for we have no such case here." (Italics added.)

Appellee relies, as did the court below, on *Morris v. Duby*, 274 U. S. 135, where this Court upheld an Oregon statute which authorized the State Highway Commission to fix maximum weights and speeds for vehicles moving over or upon the highways of the State, whenever necessary to protect the highways from undue damage. That case, as we read it, only involved the substantive validity of the regulation, no question of procedural due process being raised or discussed in the opinion. And there is a manifest distinction between a statute authorizing a highway commission to make unformly applicable regulations as to weight and speed of vehicles on the state's highways and a statute undertaking to empower a highway commissioner to pick out a particular railroad and make a grade elimination requirement applicable to it alone, as to a particular crossing, and not applicable to all railroads similarly situated.

Finally, appellee cites the language of this Court in *Missouri, etc., R. Co. v. May*, 194 U. S. 267, where it was said:

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the

joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Against that statement we quote the countervailing and interlocking principle enounced in *Yick Wo v. Hopkins*, 118 U. S. 356, and often reaffirmed:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude *that they do not mean to leave room for the play of purely personal and arbitrary power.*" (Italics added.)

And while the legislatures are the ultimate guardians of liberties and welfare of the people equally with the courts, it is not competent for a legislature to make an administrative official such "ultimate guardian" by putting in his hands such purely personal and arbitrary power as Virginia has undertaken to delegate to its Highway Commissioner. There is no room in the joints of the machine for the play of such purely personal and arbitrary power.

We submit that the federal constitutional question raised is not only substantial but is entirely well taken; that this Court has jurisdiction; that the Motion to Dismiss or Affirm should be denied; and that the decision below should be reversed on the merits.

Respectfully submitted,

THOMAS B. GAY, Richmond, Va.,
SIDNEY S. ALDERMAN, Washington, D. C.,
Counsel for Appellant.

S. R. PRINCE, Washington, D. C.,
Of Counsel.